

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF NEVADA

3
4 RICHARD WESTLEY REEVES, JR.,

3:17-cv-00562-MMD-CBC

5 Plaintiff,

6 v.

7 SHERIFF DAN WATTS, ET. AL.,

8 Defendants.

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12 Before the court is Defendants' Sheriff Dan Watts, Capt. Scott Henroid, Lt.
13 Sawyer, and Sergeant Mingo (collectively "Defendants") motion to dismiss or otherwise
14 sanction for plaintiff's failure to attend own deposition. (ECF No. 29). Reeves failed to file
15 an opposition. Defendants, however, filed a reply brief in support of their motion. (ECF
16 No. 31). Having considered the above, it is recommended that Defendants' motion be
17 granted.

18 I. BACKGROUND

19 A. Facts and Procedural History

20 Reeves was an inmate in the custody of the White Pine County Jail ("WPCJ").
21 (ECF Nos. 10, 11). While in custody, Reeves' submitted a civil rights lawsuit pursuant to
22 42 U.S.C. § 1983 alleging that his rights were violated when several employees of WPCJ
23 failed-to-protect him from a physical attack by a fellow inmate that caused him injury.
24 (ECF No. 11). Reeves' also moved to proceed with his action *in forma pauperis*. (ECF
25 No. 6). On September 17, 2018, the court granted Reeves's motion and screened his

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27 ¹ This Report and Recommendation is made to the Honorable Miranda M. Du,
28 United States District Judge. This action was referred to the undersigned Magistrate
Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4.

1 complaint pursuant to 28 U.S.C. 1915 concluding that Counts I and II should proceed.
2 (*Id.*)

3 Defendants were served with the complaint and filed their answer on November 2,
4 2018. (ECF No. 13). The court then entered a scheduling order setting the discovery
5 deadlines. (ECF No. 17). Due to Reeves's confinement, Defendants requested
6 permission to take his deposition. (ECF No. 23). The court granted the motion by minute
7 order. (ECF No. 24). However, the minute order mailed to Reeves was returned
8 undeliverable because Reeves was previously released from prison and failed to provide
9 his new address to the court. (ECF No. 25). On January 8, 2019, Reeves filed a notice of
10 change of address with the court via the CM/ECF system providing his new address.
11 (ECF No. 27).

12 Thereafter, on January 15, 2019, Defendants served Reeves with a "notice of
13 deposition" indicating that his deposition was scheduled to be taken on February 1, 2019
14 at 1:00 p.m. in Reno, Nevada. (ECF No. 29-1). This notice was mailed via U.S. Mail to
15 the new address provided by Reeves the previous week. (ECF No. 29 at 2). Reeves did
16 not object to or respond any way to the Notice of Deposition. Nor did he seek any
17 protective order from the court to prohibit his deposition from moving forward on the
18 scheduled date and time. In spite of this, Reeves failed to attend his deposition as
19 scheduled.

20 In the meantime, Defendants also served Reeves with written discovery requests
21 on January 15, 2019. (ECF No. 31 at 3). Reeves was required to respond to these
22 requests by no later than February 28, 2019. (*Id.*) To date, Reeves has also failed to
23 respond to these discovery requests. (*Id.*)

24 **B. Motion to Dismiss**

25 On February 6, 2019, Defendants moved to dismiss this case, or impose other
26 sanctions on Reeves, due to his failure to attend his deposition. (ECF No. 29).
27 Defendants argued dismissal was proper pursuant to Federal Rule of Civil Procedure
28 37(d) and 28 U.S.C. § 1915. (*Id.* at 3-4). The court issued a minute order advising

1 Reeves of his obligations to file an opposition or response to this motion pursuant to
2 *Klingele v. Eikenberry* and *Rand v. Rowland*. (ECF No. 30). Reeves's opposition was
3 due on or before Monday, February 25, 2019, however, he failed to file any opposition or
4 responsive document. (ECF No. 31 at 2).

5 On March 2, 2019, Defendants filed their reply brief. (ECF No. 31). Defendants
6 argue pursuant to Local Rule 7-2(d), the failure of Reeves to file a memorandum of
7 points and authorities in opposition to Defendant's motion is another basis for the court
8 to grant the motion. (*Id.* at 2). After reviewing the reply brief, the court entered a minute
9 order *sua sponte* granting Reeves an extension of time to file an opposition or
10 responsive document on or before March 22, 2019. (ECF No. 32). However, Reeves did
11 not file any opposition or response.

12 **II. DISCUSSION**

13 Pursuant to Federal Rule of Civil Procedure 37(d), a party who fails to attend their
14 own deposition or respond to interrogatories, may be sanctioned. Fed. R. Civ. Pro.
15 37(d)(1)(A)(i) & (ii), (d)(3). The sanctions permitted include "dismissing the action or
16 proceeding in whole or in part." Fed. R. Civ. Pro. 37(b)(2)(A)(v). In addition, when the
17 court imposes sanctions for these types of discovery failures, "the court must require the
18 party failing to act . . . to pay reasonable expenses, including attorney's fees . . . unless .
19 . . . other circumstances make an award of expenses unjust." Fed. R. Civ. Pro. 37(d)(3).

20 In addition, "the failure of an opposing party to file points and authorities in
21 response to any motion, except a motion under Fed. R. Civ. P. 56 or a motion for -
22 attorney's fees, constitutes a consent to the granting of the motion." LR 7-2(d).

23 After reviewing the documents on file and the docket in this case, the court finds
24 that Defendants' motion to dismiss should be granted. First, Reeves failed, without
25 explanation to attend his properly noticed deposition. In addition, Reeves has failed to
26 respond to properly served discovery requests, including interrogatories and requests for
27 admission. Based on the information provided, it appears that Reeves has made no
28 effort to contact Defendants' or their counsel to address any of these failures nor does it

1 appear that Reeves has delivered any discovery requests on his own in order to pursue
 2 the prosecution of this case. This a sufficient basis to sanction Reeves pursuant to Rule
 3 37, and based on Reeves's failures to attend his deposition, participate in discovery or
 4 otherwise pursue this case, dismissal of this action is appropriate.²

5 The motion should also be granted due to the failure to file an opposition or other
 6 responsive document to Defendants' motion. Reeves was on notice of his obligation to
 7 file a responsive to document to Defendants' motion pursuant to the court's order
 8 advising him of his obligations pursuant to *Klingele v. Eikenberry* and *Rand v. Rowland*.
 9 (ECF No. 30). However, when Reeves did note file a timely opposition, the court – *sua*
 10 *sponte* – provided Reeves an extension of time to file an opposition up to and including
 11 March 22, 2019. (ECF No. 32). Reeves again failed to file any opposition or responsive
 12 document. The court construes the repeated failures of Reeves to file an opposition or
 13 responsive document to constitute his consent that Defendants' motion should be
 14 granted in his entirety. LR 7-2(d).

15 **III. CONCLUSION**

16 For all of the reasons stated above, it is recommended that Defendants' motion to
 17 dismiss (ECF No. 29) be granted. The parties are advised:

18 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of
 19 Practice, the parties may file specific written objections to this Report and
 20 Recommendation within fourteen days of receipt. These objections should be entitled
 21 "Objections to Magistrate Judge's Report and Recommendation" and should be
 22 accompanied by points and authorities for consideration by the District Court.

23 2. This Report and Recommendation is not an appealable order and any
 24 notice of appeal pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of
 25 judgment.

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 27 ² Reeves was incarcerated when he initiated this lawsuit and he was granted *in*
 28 *forma pauperis* status. Therefore, the court finds that it would be unjust to require
 Reeves to pay any expenses or fees as a part of this sanction. See Fed. R. Civ. Pro.
 37(d)(3).

1 **IV. RECOMMENDATION**

2 For the foregoing reasons, **IT IS HEREBY RECOMMENDED** that Defendant's
3 Motion to Dismiss (ECF No. 29) be granted.

4 **IT IS FURTHER RECOMMENDED** that the Clerk **ENTER JUDGMENT** and
5 close this case.

6 DATE: April 15, 2019.

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UNITED STATES MAGISTRATE JUDGE
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